Vr. 427 (1)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR CHHATTISGARH

S.A. NO. 220 **/ 2006** **Single Bench**

APPELLANT / PLAINTIFF : Nandlal Jaiswal, Aged about 50 years S/o. Late Shivratan Jaiswal, R/o. Village Akhorakala, P.S. Ambikapur, Tahsil Surajpur, District Surguja (CG)

VERSUS

RESPONDENTS / DEFENDANTS :

1] Bandhu Jaiswal, S/o. Shivratan Jaiswal, Aged about 65 years, R/o. Village Kaiyanpur, P.S. and Tahsil Surajpur, District Surguja (CG)

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2] Santoshi Ram Jaiswal, Aged about 58 years, S/o. Shivratan Jaiswal, R/o. Village Akhorakala, P.S. Ambikapur, Tahsil Surajpur, District Surguja (CG)

P.R. No. 1472/06
Presented by Shri V.K. Gilhotra
dated 10/5/06

3] Smt. Sonu Jaiswal, Aged about 53 years, D/o. Late Navratan Jaiswal, R/o. Village Kaiyanpur, P.S. & Tahsil Surajpur, District Surguja (CG)

4] State of Chhattisgarh, Through: Collector, Surguja, District Surguja (Chhattisgarh)

SECOND APPEAL UNDER SECTION 100 OF CIVIL PROCEDURE CODE

AFR

(18)

HIGH COURT OF CHHATTISGARH AT BILASPUR

SECOND APPEAL NO.220 OF 2006

Nandlal Jaiswal

Vs.

Bandhu Jaiswal and others

Appearance:

Shri Manoj Paranjpe and Shri Vaibhav Govardhan, counscl for thc Appcllant.

ORAL ORDER
(31.8.2006)

Sunil Kumar Sinha, J.

(1) This is the plaintiff's second appeal filed u/s 100 of the Code of Civil Procedure. The plaintiff lost in both the courts. This appeal arises out of judgment and decree dated 27.2.2006 passed by IInd Addl. District Judge (F.T.C), Surajpur, Distt. Sarguja (C.G), in Civil Appeal No.5-A/2005, arising out of judgment and decree dated 02.9.2003 passed in Civil Suit No.86-A/2002 by the Civil Judge, Class-II, Surajpur, Distt. Sarguja (C.G).

(2) The plaintiff filed a suit for declaration, partition and permanent injunction in relation to the agricultural lands described in Schedule A & B of the Plaint. Schedule-A relates to village Akhorakala. Schedule-B relates to village Kalyanpur. The plaint allegations are that the lands of Schedule-A were the self-acquired property of his father namely Shiv Ratan Jaiswal. Shiv

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Ratan had 3 sons namely Nandlal (plaintiff), Bandhu (defendant no.1) and Santoshi Ram (defendant no.2). Another brother of Shiv Ratan Jaiswal was Nav Ratan Jaiswal, whose daughter is Smt. Sonu, defendant no.3. The plaint allegations are that the properties of Schedule-B of the plaint were acquired by Nav Ratan Jaiswal. It is further alleged that when Nav Ratan died the properties of Schedule-B were succeeded by his daughter Smt. Sonu (defendant no.3). Sonu is shown to be handicapped. The plaintiff's case is that on account of death of Nav Ratan, the question of maintenance of Sonu arose and it was decided among the family members that defendant no.1 will go to village Kalyanpur and will look after the maintenance of Sonu and he will also manage the properties of Schedule-B and in this manner, he will have no right or interest in the properties of Schedule-A at Akhorakala. The cause of action arose when defendant no.1, also claimed his right and ownership in the properties of Schedule-A of the plaint. The claim of the plaintiff is that he and defendant no.2 be declared the joint owners of the properties of village Akhorkala, and in case, the defendant no.1 is also held to be a joint owner in the properties of village Akhorakala to the extent of 1/3 share, then the plaintiff and defendant no.2 be also held to be the joint owners of properties of village Kalyanpur to the extent of 1/3 share each in the said property.

(3) The defendants no. 1 & 2 filed their written statement denying the contentions of the plaintiff. It was pleaded by them that since defendants no.1 is son of Shiv Ratan Jaiswal and the

property of schedule-A were admittedly acquired by Shiv Ratan Jaiswal, therefore, he will have 1/3 share in the said property. So far as properties of Schedule-B are concerned, his name has been mutated in those properties alongwith the name of Smt.Sonu, defendant no.3 because he is looking after the defendant no.3 and he has not accepted that property in lieu of partition in the family as has been alleged by the plaintiff.

(4) The learned trial Judge framed various issues and after recording evidence of the parties, dismissed the suit of the plaintiff holding that the plaintiff as well as defendants no.1 & 2 are joint owners of the properties of Schedule-A of the plaint to the extent of 1/3rd share of each in it. It was also held that the properties of Schedule-B of the plaint were not the properties of ownership of plaintiff or defendants no.1 & 2.

(5) Against the aforesaid judgment and decree passed by the trial Court, the plaintiff filed an appeal before the lower appellate Court. The lower appellate Court also dismissed the appeal confirming the judgment and decree passed by the trial Court.

(6) Learned counsel for appellant argues that the trial Court as well as the first appellate Court erred in law in not holding that in the earlier partition, the properties of Schedule-A of the plaint were given to the ownership of plaintiff and defendant no.2. He also argues that the courts below erred in law in not holding that defendant no.1 has surrendered his rights on the properties of Schedule-A on the condition that he will be getting

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rights of ownership in the properties of Schedule-B of the plaint along-with respondent no.3.

(7) I have heard learned counsel for the appellant at length and have also gone through the records of the Courts below.

(8) First of all, as per the records of the courts below, it appears that no such earlier partition, as has been alleged by the plaintiff, is established on record in this case. The defendant no.1 has only admitted in his cross-examination that he had gone to village Kalyanpur to look after the properties of defendant no.3 and he was managing the properties of defendant no.3 and the properties of village Akhorakala were being managed by his two brothers namely the plaintiff and defendant no.2. This does not mean that he has really relinquished/surrendered his rights in relation to the properties of Schedule-A of the plaint. More over, on account of condition of receiving properties of Schedule-B of the Plaint, the right of defendant no.1 in the properties of Schedule-A of the Plaint cannot be held to be extinguished in this case because such an action would amount to deciding the fate of properties of Schedule-B of the plaint in the life time of its owner namely Smt. Sonu, respondent no.3 herein, who is the only daughter of Nav Ratan. Under any law, her property cannot be administered/partitioned in her life time against her choice and even on some mutual agreement between the parties, regarding management of that property, right of defendant no.1 in the properties of Schedule-A of the plaint, which were admittedly the properties of his father, cannot be extinguished in the eyes of law.

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(9) In the facts and circumstances of this case, the trial Court as well as the first Appellate Court has rightly recorded this finding that defendant no.1 was also having a right and interest in the properties of Schedule-A of the plaint to the extent of 1/3rd share. This finding is a finding of fact which is neither perverse nor contrary to the records. The same has been concurrently recorded by the two Courts below. There appears to be no illegality in such finding recorded by the said courts.

(10) A perusal of section 100 C.P.C. makes it clear that the scope and exercise of jurisdiction by the High Court in the second appeal u/s 100 is limited to the substantial question of law framed at the time of admission of the appeal or additional substantial questions of law framed at the later stage after recording reasons for the same. This makes it clear that the existence of substantial question of law is *sine qua non* for the exercise of jurisdiction under the amended provisions of section 100 CPC. (***Please see (2004) Vol. V SCC 762 – Thiagarajan and others –vs- Venugopala Swamy B.Koil and others***).

(11) As to which would constitute a substantial question of law, it has been observed by the Apex Court in case of ***Santosh Hazari –vs- Purushottam Tiwari (deceased) by L.Rs. (2001) 3 SCC 179*** that "a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it

are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

(12) Recently, the Apex Court held in the matter of ***Hero Vinoth (Minor) -vs- Seshammal, reported (2006) 5 SCC 545*** that a question of law which affects rights of the parties to the suit will be substantial, if it is not covered by any specific provisions of law, or settled legal principle emerging from binding precedents of the High Court concerned, Privy Council, Federal Court or Supreme Court, and involves a debatable legal issue. A substantial question of law will also arise where the legal position is clear but the court below has decided the matter ignoring or acting contrary to such principle. However, the substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance, but may only be one which was "involved in the

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case". The Apex Court further held that an entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to root of the matter. Hence, it will depend on facts and circumstances of each case whether a question of law is a substantial one and involved in the case or not, the paramount over all consideration being to strike a judicious balance between the indispensable obligation to do justice and the impelling necessity of avoiding prolongation in life of any *lis*.

(13) In the facts and circumstances of this case, no substantial question of law is involved in this appeal. This appeal filed u/s 100 C.P.C., is dismissed at the motion stage it self. There shall be no order as to costs.

Sd/-
Sunil Kumar Sinha
Judge
31.8.2006